SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Miscellaneous No. 77-947

DONALD E. BORDENKIRCHER, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY — **PETITIONER**

V.

JOHN RANDOLPH GASTON — **RESPONDENT**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Donald E. Bordenkircher, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit consisted of an order granting the respondent's motion to affirm the judgment below. The judgment and order is not reported but is

set out in full in Appendix, page 41a. Neither the judgment nor the opinion of the United States District Court which was affirmed by the United States Court of Appeals is reported, however both are set out in full in the Appendix, pages 35a-40a.

The United States Court of Appeals for the Sixth Circuit entered an order permitting the name of Donald E. Bordenkircher to be substituted for the name of Henry E. Cowan. Donald E. Bordenkircher has replaced Henry E. Cowan as Superintendent of the Kentucky State Penitentiary

JURISDICTION

The judgment and order of the United States Court of Appeals for the Sixth Circuit was entered on the fifth day of October, 1977. This petition for a writ of certiorari was filed within ninety days of that date. Under 28 U.S.C. § 1254(1) this Court has jurisdiction to review the judgment below.

QUESTIONS PRESENTED

I. WHETHER THE COMMONWEALTH IS PROHIBITED FROM ENCOURAGING A DEFENDANT TO ENTER A PLEA OF GUILTY BY THREATENING AT THE PLEA BARGAINING SESSION TO BRING A SECOND INDICTMENT CHARGING ADDITIONAL CRIMES.

II. WHETHER PROOF THAT THE COMMONWEALTH DELIBERATELY UNDERCHARGED IN THE ORIGINAL INDICTMENT SO THAT BAIL WOULD BE SET LOWER REBUTS A PRESUMPTION OF VINDICTIVENESS.

NOTICE

The decision below was based in significant part on *Hayes v. Cowan,* 547 F.2d 42 (6th Cir, 1976), cert. granted sub nom *Bordenkircher v. Hayes,* No. 76-1334, —— U.S —— June 6, 1977). A reversal Of *Hayes,* id. Would dispose of the issues raised in the case at bar. On the other hand, an affirmance would not do so.

Hayes, supra, was argued before this Court on November 9, 1977.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT:

"No person shall be held to answer for a capital or other wise infamous crime, unless on a presentment or indictment of a grant jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, § ONE:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment and order wherein that court affirmed the judgment of the United States District Court for the Western District of Kentucky granting the respondent's application for writ of habeas corpus.

II. DECISION OF THE COURT BELOW.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court after determining that the district court did not abuse its discretion in deciding that the prosecutor's practice of obtaining habitual criminal indictments against defendants who refused to plea bargain and insist on going to trial was in violation of *Hayes*, supra. In *Hayes* the Court of Appeals for the Sixth Circuit held that the Due Process Clause of the 14th Amendment to the United States Constitution was violated when the prosecutor unjustifiably placed the defendant in fear of retaliatory action after he had refused to plead guilty to an indictment charging a substantive offense and insisted on his right to trial.

In granting the motion to affirm in this case, the United States Court of Appeal for the Sixth Circuit adopted the decision of the United States District Court for the Western District of Kentucky holding that the case was on "all fours" with *Hayes*, supra, except for the evidence concerning the policy of the Commonwealth Attorney's Office not to indict under the habitual criminal statute until it became obvious that trial was unavoidable. The district court indicated in its opinion that the evidence showed that the Commonwealth Attorney's Office had adopted the policy at the request of the Jefferson County Defense Bar so that bail would be set at a lesser amount and enable the defendants to consult more freely with their attorneys about their defense. The court said:

"*** While the testimony offered by Mr. O'Connor

might be the basis for the belief that the policy of the Commonwealth Attorney's Office was not vindictive, the holding in *Hayes,* supra and the language used on page 5 of the Opinion would seem to warrant a decision that the policy of the Commonwealth Attorney's office was unconstitutional .... Also, as in *Hayes, supra* there is no indication that the prosecutor, had he thought such an indictment proper, could not have included the habitual criminal charges in the original indictment." Appendix, pages 38a & 39a.

III. COURSE OF THE PROCEEDINGS.

John Randolph Gaston, respondent, filed an application for a writ of habeas corpus in the United States District Court for the Western District of Kentucky claiming among other things that the plea bargaining process denied him his constitutional rights in that it was oppressive and coercive. After considering the application and this petitioner's return to show cause order, the district court entered a judgment denying the application. The decision was appealed to the United States Court of Appeals for the Sixth Circuit which vacated the judgment and remanded the case to the district court to make a determination as to whether the prosecutor threatened Gaston with seeking an indictment under the habitual criminal statute as was the case in *Hayes,* supra.

In accordance with the Order of the United States Court of Appeals for the Sixth Circuit, the district court set an evidentiary hearing wherein trial counsel for Gas-

States Court of Appeals for the Sixth Circuit in *Hayes*

ton, Rose Shipp, testified that she attended a pre-trial conference regarding her client's indictments. Appendix, pp. 6a & 7a. She testified that she discussed the case with Mr. O'Connor, who was the Assistant Commonwealth Attorney prosecuting the case. She said that Mr. O'Connor inquired whether Gaston was willing to enter a plea of guilty in return for a recommendation of the Commonwealth. Mrs. Shipp indicated that Gaston was not willing to accept the plea because he was not guilty of the charges. Mrs. Shipp then testified at that point that Mr. O'Connor said ". . . we'll go out and get date for trial and I am going to have a habitual criminal indictment broughtt down." Appendix, page 7a. The plea bargaining session was held on the twelfth day of October, 1973. Appendix, page 6a. Mrs. Shipp testified that she had known about the Commonwealth's position prior to the plea bargaining session and that she had previously advised Gaston as to the consequence of a decision to enter a plea of not guilty. Appendix, page 7a.

Edward O'Connor, the Assistant Commonwealth's Attorney who prosecuted Gaston in the Jefferson Circuit Court, explained the offer made at the plea bargaining session. Gaston was arrested in Jefferson County on several charges of illegal sale of heroin. At the time of his arrest he was released on probation. Revocation of his probation would result in his serving a ten year sentence. In return for a plea of guilty for illegal sale of heroin, the prosecutor offered to recommend that the ten year sentence for which Gaston was already convicted be revoked and that Gaston be placed on probation on the new plea of guilty. Under the recommendation, Gaston's

probation would be revoked. Gaston would be eligible however for parole after serving one year of the ten year sentence. As to the new sentence Gaston would be placed on probation, and he would not be required to serve time in the penitentiary so long as he did not violate the conditions. This was the offered recommendation which Gaston and his trial counsel rejected at the plea bargaining session. Appendix, pages 14a, 17a, 18a.

Mr. O'Connor explained why the Commonwealth Attorney's Office had changed its policy of indicting under the habitual criminal statute at the same time as the principle offense. His testimony was as follows:

> " . . . the practice in the Commonwealth Attorney's office was to indict everybody that was eligible as a habitual at the time they were taken to the grand jury originally; in other words, if they were habitual candidates, we indicted them initially.
>
> Well, because of the meeting with the defense attorneys and Academy of Justice and everybody else, they were complaining that our office . . .
>
> MS. KING: Object. Your Honor.
>
> THE COURT: I'm going to let it go in for this time. Go ahead.
>
> MR. O'CONNOR: The reason that our office quit doing it initially is that the defense bar complained when they were indicted as habitual. *At the outset, the judges would set the bonds much higher and they couldn't get their clients out of jail; and they*

considered that a real grievance." (Emphasis added).

Appendix, pages 15a & 16a.

Since the Commonwealth Attorney's Office no longer indicted under the habitual criminal statute at the outset, the practice was to advise the defense counsel at the plea bargaining session that the client was eligible to be indicted as a habitual criminal. Appendix, pages 17a & 18a.

The prosecutor explained how he reached his decision to seek an indictment under the habitual criminal statute as follows:

> "It was my point to advise them initially before any plea negotiations at all and also they would know, but not to exercise a useless gesture until you were sure you were going to have to go to trial; and I don't—the Court can conclude any way they want to. I would just say it had nothing to do with the fact that he wouldn't take the offer. It had to do with in all cases that I handle that if it was going to be tried, I felt like probably the best practice was to do it initially, but because the office was accommodating the defense counsel as far as bonds, the next best thing we could do is just advise them at the outset what we were going to do and not connect that in any way with the plea bargaining." Appendix, page 19a.

The United States District Court after considering the evidence and briefs submitted by the parties granted the respondent's application for writ of habeas corpus.

On a motion by Gaston the United States Court of Appeals for the Sixth Circuit summarily affirmed this decision.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has decided an important constitutional question which has not been, but should be, settled by this Court.

In *Santobello v. New York,* 404 U.S. 257, (1971), this Court recognized the wide spread use of "plea bargaining" and the fact that plea bargaining properly conducted is essential to the orderly administration of justice. This Court said:

> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See *Brady v. United States*, 397 U.S. 742, 751-752.
>
> *Santobello,* supra, at 261.

In *Hayes*, supra, the United States Court of Appeals

for the Sixth Circuit held that the return of a second indictment charging a defendant not only with a principal offense but also with a violation of the habitual criminal or enhancement statute after the unsuccessful plea negotiations on the original indictment charging the defendant solely with the principal offense caused a strong inference or presumption of vindictiveness to arise. The only evidence offered by the Commonwealth was the defendant's prior criminal record. The court held that the prior criminal record was insufficient to rebut the presumption of vindictiveness. The court indicated that in order to rebut the presumption, the Commonwealth must rely on events occurring between the return of the original and second indictments. In *Hayes* the Commonwealth showed no events in this time period other than the defendant's insistence upon trial. The court held this showing was not enough. There was no explanation why the first indictment could not have contained the habitual criminal count. The court indicated, however, that the presumption would not arise when the prosecutor indicted for all charges in the original indictment.

In the case at bar, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court based upon its decision in *Hayes*, supra. While in *Hayes* the Sixth Circuit made severe enroads in the plea bargaining process, the decision here went even further. The Court of Appeals agreed with the district court that the evidence presented by the Commonwealth of Kentucky was insufficient to overcome the presumption of vindictiveness. The proof introduced by the Commonwealth showed that it had adopted the policy of not seeking an indictment on all charges (including

habitual criminal count) at the same time at the request of the Jefferson County Defense Bar. The defense bar wanted their defendants indicted solely on the principle offense so that bail would be set lower. The Commonwealth Attorney's office did not seek indictments charging habitual criminality until it became obvious that trial was unavoidable. It is this petitioner's position that there could never be a better explanation for the policy employed in the case at bar, and further that this evidence without question rebutted any possible presumption of vindictiveness on the part of the Office of the Commonwealth's Attorney. The judgment of the Court of Appeals has the effect in the instant case of saying that the presumpton of vindictiveness is virtually irrebuttable.

In a plea bargaining session both the state and the defendant make certain concessions. The prosecutor may agree to recommend a sentence, move for dismissal of certain counts in the indictment, or not seek additional indictments on other crimes which the defendant has committed. In return for the prosecutor's promise the defendant may agree to enter a plea of guilty to a certain count or counts in the indictment thereby relieving the prosecutor of the burden of proving the elements of the crime. If the plea bargaining session is successful the parties have struck a bargain. If a defendant enters a plea of guilty the prosecutor must perform his contractural obligation pursuant to the agreement reached at the plea bargaining session. *Santobello*, supra.

In *Brady v. United States*, 397 U.S. 742, 749 (1970), this Honorable Court recognized that it would be impossible for the prosecutor and the defendant to reach an

agreement in absence of some encouragement from the state. Nevertheless, this Court indicated in *Brady* that there were certain limits on the kind of encouragement the state can bring to bear on a defendant. The state cannot employ either actual or threatened physical harm. *Brady*, supra, at 750. It cannot employ mental corecion. *Brady*, supra, at 750. It cannot employ mental corecion. prosecution on charges not justified by the evidence. *Brady*, supra, at 751, footnote 8.

In neither the case at bar nor in *Hayes*, supra. did the Commonwealth of Kentucky physically harm the defendant to produce the guilty plea. The Commonwealth did not threaten physical harm, and did not threaten prosecution for additional crimes unjustified by the evidence. In both the case at bar and in *Hayes*, the prosecutor merely explained to the defendant and his lawyer that the defendant could be indicted under the habitual criminal statute and that he would seek such an indictment if he was required to go to trial in order to prove the elements of the principle offense charged in the original indictment. Admittedly this was coercion. But in absence of this kind of coercion, plea bargaining will cease to play a role in the administration of justice.

I.

ONLY THE TRIAL COURT HAS AUTHORITY TO DISMISS CHARGES BROUGHT IN THE INDICTMENT.

In *Hayes*, supra, pp. 44 & 45 the United States Court of Appeals for the Sixth Circuit held that the return of a second indictment charging the defendant

with recidivism after an unsuccessful plea bargaining session on the original indictment charging only the principle offense created a presumption of vindictiveness. In so holding, the court implied that such a presumption would not have been created had the Commonwealth brought all of the charges in the original indictment. When the prosecutor returns an original indictment charging only the principle offense and withholding the habitual criminal count and other crimes for use in the plea bargaining session, he can guarantee that the defendant will not be prosecuted for either recidivism or additional crimes. Such is not the case, however, when the prosecutor returns an indictment setting out all the charges against the defendant. In latter circumstance if the prosecutor were to make a representation that he could drop certain charges he would be violating the requirement of *Santobello,* supra, to bargain in good faith. Under Kentucky Rule of Criminal Procedure 9.64 the Commonwealth Attorney may move for dismissal of charges in an indictment but the ultimate decision is within the court's discretion. *Kidd v. Commonwealth,* 255 Ky. 498, 74 S.W.2d 944 (1934).

Surely the dictomy made by the Sixth Circuit in *Hayes,* supra, is not valid. Under this ruling a prosecutor acting in good faith is stripped of all viable options when he is required to "lay all of his cards on the table" before the plea bargaining session. By the same token, when the prosecutor returns an indictment including all charges, the defendant has few if any options available. Not many defendants will enter a plea of guilty to certain charges in an indictment leaving it to chance that

the trial court with knowldege of the defendant's prior criminal record will dismiss either a habitual criminal count or other remaining counts contained in the indictment.

II.

PLEA BARGAINING IS AN ADVERSARY STEP IN A CRIMINAL PROCEEDING.

In reaching its decision in *Hayes*, supra, the Sixth Circuit relied primarily on two cases handed down by this Court wherein it condemned vindictive practices by the court and the prosecutor. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court considered a case wherein a defendant after a successful appeal and reconviction was sentenced by the same judge to a greater punishment than he received at the first trial. This Court said " . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear. . . ." *Pearce*, at p. 726. This rule was designed to free a defendant who desires to appeal or file a collateral attack from apprehenson of a retaliatory move on the part of a sentencing judge. The reasons for increasing the sentence must be based upon conduct occurring after the original conviction.

In *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court considered a case wherein the prosecutor returned an indictment charging the defendant with a felony based on the same conduct for which the defendant had previously been convicted of a misdemeanor. The pros-

ecutor obtained the indictment after the defendant filed an appeal from the misdemeanor conviction. This Court applied the principles espoused in *Pearce,* supra, saying "... a person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one." *Blackledge* at p. 28. Although there was no evidence of bad faith or maliciousness on the part of the prosecutor, a potential for vindictiveness nevertheless existed as in the of *Pearce,* supra.

A judge by virtue of his duties is required to be "a neutral and detached magistrate." In order to maintain this image the Court must always place in the record a basis for its actions. In *Blackledge,* supra, this Court for the first time applied the standard of a neutral and detached magistrate to a prosecutor. The role of the prosecutor had always been that of an adversary. This Court determined in *Blackledge* that the prosecutor should no longer be an adversary after obtaining a conviction and sentence. He should have no interest in punishing the defendant further.

On the other hand this Court recognized in *Brady,* supra, at 750 that the prosecutor has an interest "at every important step in the criminal process" in convicting the defendant and removing him as a threat to the public. As stated previously, this Court has said that in achieving his goal the prosecutor cannot threaten either physical harm or prosecution for a crime not justified by the evidence. However, this Court has never held that the prosecutor cannot coerce a plea of guilty

by threatening prosecution for a crime justified by the evidence. This was the situation both in the case at bar and in *Hayes*, supra.

Although the prosecutor may have no interest in punishing the defendant further following a trial and conviction, *Blackledge*, supra, he obviously has an interest in doing so before conviction. His duty is to prosecute a defendant for the crimes for which he stands charged. In both the case at bar and in *Hayes*, supra, this Court should determine the time at which the prosecutor must doff his armor and don his robe.

Neither *Pearce* nor *Blackldege* stands for the proposition that the prosecutor must wear the robes of a judge at an important step in the criminal process. In *United States v. Jamison*, 505 F.2d 407 (D.C.Cir., 1974) the Court reversed a first degree murder convition obtained after the defendant had been granted a mistrial on a second degree murder indictment. The defendant's trial counsel moved for a mistrial based on ineffective assistance of counsel. The Court's ruling on this motion could hardly be considered an important step in the criminal process. In *United States v. DeMarco*, 401 F.Supp. 505 (C.D.Cal., 1975). aff'd 550 F.2d 1224 (9th Cir., 1977). cert. denied No. 176-1671, —— U.S. —— (June 13, 1977), the Court refused to allow prosecution of an indictment obtained after a defendant asserted his right to a change of venue on a prior indictment charging less serious crimes. As in *Jamison*, it could hardly be said that the Court's ruling on a motion for change of venue was an important step in the criminal process. In *Jamison* and *DeMarco* the courts extend-

ed the rule in *Blackledge* from a post-trial stage to a trial stage in the former case and a pre-trial stage in the latter. Although both cases represent an unwarranted extension of *Blackledge,* it is nevertheless apparent that in neither case did the prosecutor nor the public have an interest in increasing the charges. In both cases the prosecutor acted as an adversary at a relatively unimportant stage of the criminal process. Furthermore, neither *Jamison* nor *DeMarco* dealt with plea bargaining. Consequently, neither is applicable to the case at bar.

In *United States v. Ruesga-Martinez.* 534 F.2d 1367 (9th Cir., 1976), the Court held that in absence of evidence justifying an increase in charges, a defendant cannot be tried on the increased charges after entering a plea of not guilty and refusing to waive trial by judge on a misdemeanor charge arising out of the same transaction. *Ruesga-Martinez* has no application to the case at bar or to *Hayes,* supra, because the magistrate who is required to act as a neutral and detached magistrate was the party responsible for the additional charges.

As stated earlier, this Court has recognized and sanctioned the rationale for plea bargaining. *Santobello,* supra. It is an important step in the criminal process. It is an adversary stage of the criminal proceeding at which the prosector should be permitted to encourage pleas of guilty. The Sixth Circuit's decision in *Hayes,* supra, and in the case at bar has stretched the holding in *Blackledge,* supra, so far as to say that the prosecutor must at all stages of a criminal

proceeding wear the robes of the judge. He is to doff forever his coat of armor.

III.

THE PROOF DOES NOT SHOW THAT THE PROSECUTOR REFUSED TO RENEW NEGOTIATIONS.

The Sixth Circuit lost sight of another factor both in *Hayes, supra,* and in the case at bar. In neither case did the defendant introduce proof that the Commonwealth refused to deal further after the second indictment was returned. The defendant had the option of renewing plea negotations up to the time of trial. Apendix page 21a.

IV.

BLACKLEDGE APPLIES ONLY TO CHARGING A HIGHER DEGREE OFFENSE.

The opinion of the Sixth Circuit in *Hayes,* supra. was based primarily on the rationale in *Blackledge,* supra. *Blackledge* was the first case extending the role of neutrality to the prosecutor. There the prosecutor increased the defendant's criminal liability by charging a higher degree offense. The same is true in *Jamison*

In *United States v. Mallah,* 503 F.2d 971 (2nd Cir., 1974), the Court reversed a case wherein the appellant Pacelli was convicted of distributing and possessing heroin. The appellant claimed he was originally charged with distributing and possessing cocaine and that the United States Attorney substituted the heroin charges

after appellant disclosed that the United States Attorney had promised a co-defendant immunity in return for testimony. The Court in disposing of this contention said:

> "This theory might have some force had the government, for example added to a previous charge of distributing narcotics in violation of 21 U.S.C. § 841 a charge of distributing that same narcotic to a minor in violation of 21 U.S.C. § 845. That is not the case here. It is one thing to increase a charge from manslaughter to murder and quite another to charge a defendant, subsequent to a successful appeal with a second murder. In the words of Williams, 'Pearce would have application, if a prosecutor . . . charged a defendant whose first conconviction had been set aside, with a more serious offense *based upon the same conduct.*' 436 F.2d at 105 (emphasis added). Here, the heroin counts are based upon acts which are distinct from charges previously brought against appellant. The government's decision to prosecute appellant for counts two and six is well within the traditionally broad ambit of prosecutorial discretion." p. 988.

In *Blackledge,* supra, the prosecutor charged the defendant with a higher degree offense. The prosecutor increased the charge vertically. See *Alschuler,* "The Prosecutor's Role in Plea Bargaining" 36 *Univ.* of *Chicago Law Review* 50, at pp. 85 & 86.

In order to prove the offense of habitual criminality it is necessary to prove only that the defendant was convicted of the principle offense, regardless of its nature.

KRS 431.190 It is not necessary to prove the elements of the principle offense. When as in the case at bar the prosecutor in a second indictment brings for the first time the charge of habitual criminality he has increased the charge horizontally not vertically. *Morgan v. Devine*, 37 U.S. 632 (1915). Since *Blackledge* applies only to verticle overcharging it has no application here.

V.

PROOF THAT THE COMMONWEALTH DELIBERATELY UNDERCHARGED IN THE ORIGINAL INDICTMENT SO THAT BAIL WOULD BE SET LOWER REBUTS THE PRESUMPTION OF VINDICTIVENESS.

In the case at bar the Sixth Circuit has gone further than its ruling in *Hayes*, supra. In *Hayes*, the court said that while the return of a second indictment charging the habitual criminal count following an unsuccessful plea bargaining session creates a presumption of vindictiveness, the presumption is nevertheless rebuttable. This petitioner cannot foresee a situation wherein the evidence to rebut vindictiveness could be stronger than here. Yet the Sixth Circuit held that the inference stood in the face of this evidence. The Sixth Circuit decision in this case renders the presumption of vindictiveness irrebuttable.

In *Hayes*, the prosecutor as part of his cross-exam-

ination at sentencing indicated that he previously informed the defendant that he would seek an indictment under the recidivist statute if he did not enter a plea of guilty and save him the inconvenience and time required in going to trial on the charges in chief. *Hayes,* supra, p. ——. footnote 2. The Sixth Circuit considered this as an admission of vindictiveness. *Hayes,* supra, at 45. In reaching its conclusion that *Hayes,* was denied due process of law by virtue of the plea bargaining session the Court said:

> ". . . In this case the prosecutor does not assert that any event occured between the issuance of the first indictment and the issuance of the second to influence his decision except petitioner's insistence upon his right to trial. There is no indication that the prosecutor, had he thought such an indictment proper, could not have included habitual criminal charges in the original indictment." *Hayes,* at 44.

In the case *sub judice* the evidence indicates that the extra time the prosecutor would necessarily have to spend on the case was not the sole reason for returning the second indictment charging criminality. He sought the indictment for two additional reasons: the charge was available due to the past record of the defendant and trial on the principle charge was unavoidable.

In *Hayes,* supra, the evidence indicated that the prosecutor thought the habitual criminal indictment was proper. On the other hand, in the case *sub judice* the evidence by the prosecutor shows that the Common-

wealth Attorney's Office felt that it was improper to obtain an indictment under the habitual criminal statute at the same time it obtained one on the substantive charges. To do so would cause bail to be set so high that it would be unavailable.

When the Sixth Circuit considered the case at bar for the first time, it concluded that there was nothing in the record to support a likelihood of vindictiveness. It therefore remanded the case to the District Court for further findings about the prosecutor' conduct in the pretrial plea negotiations and for further consideration consistent with *Hayes*, supra.

At the evidentiary hearing before the District Court, trial counsel for Gaston indicated that she was informed by the prosecutor that he would seek an indictment under the habitual criminal statute if Gaston did not enter a plea of guilty to the charge in chief. (App., 7a).

She received this information prior to the plea-bargaining session. (App., 7a). Defense counsel also testified that the prosecutor reiterated his offer at the plea-bargaining session when Gaston was present (App., 6a & 7a).

Although there was nothing in the record to raise a presumption of vindictiveness on the part of the prosecutor before the evidentiary hearing in the United Staates District Court, the petitioner concedes that the foregoing testimony does raise such a presumption. However, the petitioner offered testimony from Elward O'Conner, the prosecutor in the case at bar. His testimony rebuts any presumption of vindictiveness on the part of the Commonwealth's Attorney. Mr. O'Connor

testified that it had formerly been the practice of the Commonwealth Attorney's Office to indict on all charges including the habitual criminal charge at the same time. He further testified that because of a plea of the Jefferson County Defense Bar the Commonwealth Attorney's Office had re-examined its policy and decided not to seek an indictment on the habitual criminal statute unless it became apparent that trial was unavoidable. The Commonwealth Attorney's Office adopted this policy so that bail would be set at a lower rate and permit defendants to be released pending trial. Mr. O'Conner also stated that in the case at bar he did not seek an indictment under the habitual statute until it was determined for certain that trial was unavoidable. (App.,15a 16a, 19a).

In *Pearce*, supra the Supreme Court reversed but not without saying that the state failed to offer any evidence of justification at any stage of the habeas corpus proceeding. On the other hand. in the case at bar the Commonwealth of Kentucky has offered evidence to show that the conduct of the Commonwealth Attorney's Office was motivated by benevolence. The Commonwealth Attorney's Office did not indict under the habitual criminal statute at the outset so that a lower bail would be available for the defendant. This rebuts any inference of vindictive conduct.

The United States Court of Appeals for the Sixth Circuit upheld the decision of the District Court wherein it was held that the evidence failed to rebut the inference of vindictiveness. It was tantamount to holding that

the presumption of vindictiveness created by the *Hayes*, decision was not rebuttable.

CONCLUSION

This Court granted the application for writ of certiorari in *Hayes*, supra. The decision in the case at bar was made on the basis of *Hayes*. However, in affirming the decision below the Court of Appeals for the Sixth Circut went one step further. It held that the evidence offered by the Commonwealth of Kentucky was insufficient to rebutt the presumption of vindictiveness. The petitioner submits that the evidence offered by the Commonwealth more than rebutted the presumption and that the Sixth Circuit's holding was tantamount to labeling the presumption of vindictiveness irrebutable.

The petitioner submits that it is necessary for this Court to review the decision of the Court of Appeals for the Sixth Circuit wherein the Court obliterated the role of plea bargaining. If the decision of the Court of Appeals is permitted to stand the administration of criminal justice will be severely handicapped.

Respectfully submitted,

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PROOF OF SERVICE

I, George M. Geoghegan, Jr., Counsel for the Petitioner, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Hon. Kathleen C. King, Counsel for Respondent, 222 East Central Parkway, Cincinnati, Ohio 45202, this 29 day of December, 1977.

George M. Geoghegan Jr.

GEORGE M. GEOGHEGAN, JR.
ASSISTANT ATTORNEY GENERAL
Commonwealth of Kentucky